

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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UNITED STATES OF AMERICA,	)	
LEECH LAKE BAND OF OJIBWE, and	)	
THE STATE OF MINNESOTA,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
v.	)	
	)	
ENBRIDGE ENERGY,	)	
LIMITED PARTNERSHIP,	)	
	)	
Defendant.	)	

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**CONSENT DECREE**

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## **I. BACKGROUND**

A. The United States of America (“United States”), on behalf of the Secretary of the United States Department of the Interior (“DOI”), acting through the United States Fish and Wildlife Service (“FWS”) and the Bureau of Indian Affairs (“BIA”); the Leech Lake Band of Ojibwe (“Tribe”); and the State of Minnesota (“State”), on behalf of the Minnesota Pollution Control Agency (“MPCA”) and the Minnesota Department of Natural Resources (“MDNR”) (collectively, “Plaintiffs”), filed a joint Complaint against Enbridge Energy, Limited Partnership, (“Settling Defendant” or “Enbridge”) pursuant to the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2701, *et seq.* and the Minnesota Water Pollution Control Act (“WPCA”), MN. Stat. § 115.07, subd. 3.

B. In the Complaint, the United States, the Tribe, and the State allege that the Settling Defendant is liable for injury to, destruction of, loss of, or loss of use of certain Natural Resources resulting from a July 4, 2002 release of approximately 6,000 barrels of crude oil from a 34-inch subsurface pipeline owned by Enbridge, into a peat wetland complex that is within the watershed of Blackwater Creek, a tributary to the Mississippi River, near Cohasset, Minnesota (the “Discharge Incident”).

C. Enbridge is a Delaware limited partnership that is licensed to do business in Minnesota.

D. Pursuant to Executive Order 12580, as amended by Executive Order 12777, and the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. Part 300, DOI has been delegated authority to act as the Federal Trustee for the Natural Resources affected by the Discharge Incident. MPCA and MDNR have been delegated to act as State Trustees for the Natural Resources affected by the Discharge Incident pursuant to 40 C.F.R. §

300.605 and Minnesota Executive Order 99-17, 24 Minn. S.R. 182. The Tribe has been delegated authority to act as a Tribal Trustee pursuant to 40 C.F.R. § 300.610.

E. Plaintiffs allege that the Discharge Incident resulted in injury to Natural Resources, including a fresh water wetland habitat and the plant and wildlife species which utilize that habitat. Plaintiffs further allege that the Discharge Incident and measures taken in response to the Discharge Incident resulted in injury to air resources. The United States, the State, and the Tribe (the "Natural Resource Trustees") share trusteeship of the injured resources and are coordinating restoration efforts.

F. In accordance with OPA and its implementing regulations, the Natural Resource Trustees prepared a Restoration Plan and Environmental Assessment ("Restoration Plan"), dated November 2005, that was subject to public notice and comment. A copy of the Restoration Plan is attached hereto and is incorporated herein by reference as Appendix A. The purpose of the Restoration Plan was to inform the public about the affected environment and the restoration actions proposed to compensate for injuries caused by the Discharge Incident to Natural Resources and their services. The Restoration Plan was developed in cooperation with the Settling Defendant. The Natural Resource Trustees did not receive any public comments on the Restoration Plan.

G. Neither the execution of this Consent Decree by the Settling Defendant nor the entry of this Consent Decree by the United States District Court shall be deemed or construed to be: (1) an admission of liability by the Settling Defendant of any liability arising out of the transactions or occurrences alleged in the Complaint; or (2) an affirmation of the Plaintiffs' assessment of the Natural Resource Damages resulting from the Discharge Incident.

H. The United States, the State, the Tribe, and the Settling Defendant (collectively,

the “Parties”) agree that settlement of this case without further litigation and without admission, adjudication or determination of any issue of fact or law, except as specified herein, is the most appropriate means of resolving this action.

I. The Parties agree, and the Court by entering this Consent Decree finds, that this Consent Decree: (i) has been negotiated by the Parties in good faith; (ii) will avoid prolonged and complicated litigation among the Parties; (iii) will expedite performance of Natural Resource restoration activities; and (iv) is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed as follows:

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1362 and OPA Section 1017(b), 33 U.S.C. § 2717(b). This Court has supplemental jurisdiction over related state law claims under 28 U.S.C. § 1367. This Court also has personal jurisdiction over the Settling Defendant. The United States and the Tribe are authorized to bring this action pursuant to 33 U.S.C. § 2717. The State is authorized to bring this action pursuant to 33 U.S.C. § 2717 and Minn. Stat. § 115.071, subd. 3. Solely for the purposes of this Consent Decree, including enforcement thereof, and the underlying Complaint, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Settling Defendant shall not challenge the terms or validity of this Consent Decree or contest this Court’s jurisdiction to enter or enforce this Consent Decree in this or any subsequent proceeding arising from it.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, the State, the Tribe, the Settling Defendant, and their successors and assigns. Any change in ownership or corporate or

other legal status including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Settling Defendant under this Consent Decree.

3. The undersigned representative of the Settling Defendant certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally the Settling Defendant to this document, and has identified on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant shall notify the U.S. Department of Justice, DOI, the Tribe, and the State of any change in the identity or address of the Settling Defendant, its agent for service, or its counsel.

4. The Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. The Settling Defendant shall be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree.

#### **IV. DEFINITIONS**

5. Unless otherwise defined herein, terms used in this Consent Decree which are defined in OPA, 33 U.S.C. § 2701, or in regulations promulgated pursuant to OPA, *e.g.*, 15 C.F.R. Part 990, shall have the meaning assigned to them in that statute or regulation. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto.

All appendices are incorporated herein by reference.

“Day” shall mean a calendar day unless expressly stated to be a working day.

“Working Day” shall mean a day other than a Saturday, Sunday or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or Federal holiday, the period shall run until the close of business of the next working day.

“DOI” shall mean the United States Department of the Interior and any successor departments or agencies of the United States.

“Effective Date” shall mean the effective date of this Consent Decree as provided in Section XVII of this Consent Decree (Effective Date and Retention of Jurisdiction).

“FWS” shall mean the Fish and Wildlife Service of the United States Department of the Interior, and any successor departments or agencies of the United States.

“*Force Majeure* event” shall mean any event arising from causes beyond the control of the Settling Defendant or any entity controlled by the Settling Defendant, including but not limited to its contractors and subcontractors, that delays or prevents the performance of any obligation under this Consent Decree despite the Settling Defendant’s best efforts to fulfill the obligation. “Best efforts” to fulfill an obligation includes using best efforts to anticipate any potential *force majeure* event and best efforts to address and mitigate the effects of any potential *force majeure* event (1) as it is occurring and (2) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. Financial inability to fulfill any obligations under this Consent Decree does not constitute a *force majeure* event.

“Forest Service” shall mean the U.S. Forest Service, the land manager for the Chippewa National Forest, and any successor departments or agencies of the United States.

“Interest” shall mean interest calculated in the manner specified by OPA Section 1005(b)(4), 33 U.S.C. § 2705(b)(4).

“Lead Administrative Trustee” shall mean FWS. The Lead Administrative Trustee is responsible for Work oversight and coordination among the Trustees and Enbridge.

“MDNR” shall mean the Minnesota Department of Natural Resources and any successor departments or agencies of the State of Minnesota. MDNR is designated as a Co-Trustee for Natural Resources for purposes of OPA. See Minnesota Executive Order 99-17.

“MPCA” shall mean the Minnesota Pollution Control Agency and any successor department or agencies of the State of Minnesota. MPCA is designated as a Co-Trustee for Natural Resources for purposes of OPA. See Minnesota Executive Order 99-17.

“Natural Resources” shall mean land, resident and anadromous fish, wildlife, biota, air, surface water (including sediments), wetlands, ground water, drinking water supplies, and all other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, the State, or the Tribe.

“Natural Resource Damages” shall mean damages for injury to, destruction of, loss of, or loss of use of Natural Resources, including the reasonable costs of assessing the damage, recoverable under OPA Section 1002(b)(2)(A), 33 U.S.C. § 2702(b)(2)(A) or WPCA Section 115.071, subd. (3)(b), Minn. Stat. § 115.071, subd. (3)(b).

“Natural Resource Trustees” or “Trustees” shall mean DOI, the Tribe, MPCA, and MDNR.

“NRDAR Fund” means the DOI Natural Resource Damage Assessment and Restoration Fund, established pursuant to 43 U.S.C. §§ 1474b and 1474b-1.

“Oil” shall mean any “oil” defined as such under CWA Section 311(a)(1), 33 U.S.C.

§ 1321(a)(1), and OPA Section 1001(23), 33 U.S.C. § 2701(23).

“OPA” shall mean the Oil Pollution Act of 1990, as amended, 33 U.S.C. § 2701, *et seq.*

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States, the State, the Tribe, and the Settling Defendant.

“Plaintiffs” shall mean the United States, the State, and the Tribe.

“Discharge Incident” shall mean the July 4, 2002, pipeline rupture in Itasca County, Minnesota, near Cohasset, Minnesota.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” shall mean Enbridge Energy, Limited Partnership.

“Site” or “Enbridge Energy Pipeline Site” shall mean the area associated with the Discharge Incident. The Site is generally depicted on the map attached as Appendix D to this Consent Decree.

“State” shall mean the State of Minnesota, including MDNR and MPCA.

“Subparagraph” shall mean a portion of this Consent Decree identified by a lower case letter or an Arabic number in parenthesis.

“Tribe” shall mean the Leech Lake Band of Ojibwe.

“United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

“Work” shall mean all activities that Settling Defendant is required to perform under this Consent Decree, as set forth in the Natural Resource Restoration Project Implementation and Monitoring Work Plan (attached hereto as Appendix B) and the Restoration Project Implementation and Monitoring Agreement (attached hereto as Appendix C). The Work

includes: (i) the removal of a portion of Forest Road 3725 and the restoration of approximately 28 acres of forested and scrub shrub wetlands, all within the Chippewa National Forest; and (ii) the retrofit of ten diesel school buses owned by the Tribe with Diesel Oxidation Catalyst devices.

## **V. GENERAL PROVISIONS**

6. **Objectives of the Parties.** This Consent Decree provides the terms upon which the Parties agree to settle all claims of the Natural Resource Trustees against the Settling Defendant, under applicable federal, state, and tribal law, for certain Natural Resource Damages resulting from the Discharge Incident, as alleged in the Complaint.

7. **Obligations of the Settling Defendant.** In settlement of the claims of the Natural Resource Trustees, the Settling Defendant will perform those actions provided in Sections VI and VII below.

8. **Compliance with Applicable Law.** All activities undertaken by the Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations.

## **VI. PERFORMANCE OF RESTORATION PROJECT**

9. The Settling Defendant shall finance and perform the Work in accordance with this Consent Decree, the Restoration Project Implementation and Monitoring Work Plan (“Work Plan”) and the Restoration Project Implementation and Monitoring Agreement between Natural Resource Trustees, Enbridge, and the Forest Service for Forest Road 3725 Restoration Project (“Forest Road Agreement”). The Work Plan and the Forest Road Agreement are attached hereto and incorporated herein by reference as Appendices B and C, respectively. The Work Plan and Forest Road Agreement, including any amendments thereto, shall be fully enforceable under this Consent Decree.

10. The Settling Defendant shall commence performance of the Work no later than June 1, 2008 and shall perform the Work in accordance with the schedule set forth in the Restoration Projects Time Schedule, attached hereto and incorporated herein as Appendix E.

11. Permits.

a. Where any portion of the Work requires a federal or state permit or approval, the Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendant may seek relief under the provisions of Section IX (*Force Majeure*) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

12. Supervising Contractor.

a. All aspects of the Work to be performed by the Settling Defendant pursuant to Section VI (Performance of Restoration Project) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor. Settling Defendant's selection of Xtreme Environmental Solutions, Inc. has been approved by the Plaintiffs.

b. If the Settling Defendant proposes to change a Supervising Contractor, the Settling Defendant shall give notice to the Lead Administrative Trustee and must obtain an authorization to proceed from the Lead Administrative Trustee before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

c. If the Lead Administrative Trustee disapproves of a proposed Supervising Contractor, the Lead Administrative Trustee will notify the Settling Defendant in writing and

articulate its reasons for disapproval. The Settling Defendant then shall submit to the Lead Administrative Trustee a list of contractors, including the qualifications of each contractor, that would be acceptable to the Settling Defendant within 30 days of receipt of the Lead Administrative Trustee's disapproval of the contractor previously proposed. The Lead Administrative Trustee will provide written notice of the names of any contractors that it disapproves and an authorization to proceed with respect to any of the other contractors. The Settling Defendant may select any contractor from that list that is not disapproved and shall notify the Lead Administrative Trustee of the name of the supervising contractor selected within 21 days of the Lead Administrative Trustee's authorization to proceed.

d. If the Lead Administrative Trustee fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines, the Settling Defendant may seek relief under the provisions of Section IX (*Force Majeure*).

13. Project Manager. Within 30 days of the Effective Date, the Settling Defendant and the Lead Administrative Trustee shall notify each other, in writing, of the name, address and telephone number of their respective designated Project Managers. If a Project Manager initially designated is changed, the identity of the successor will be given to the other Parties in writing. The Settling Defendant's Project Manager shall have the technical expertise sufficient to adequately oversee all aspects of the Work, and shall be subject to disapproval by the Lead Administrative Trustee.

14. Completion of the Work.

a. Within 90 days after the Settling Defendant concludes that all Phase One Work of the Work Plan ("Phase One Work") has been fully performed, the Settling Defendant

shall schedule and conduct an inspection to be attended by the Settling Defendant, the Lead Administrative Trustee, and the Forest Service. If, after the inspection, the Settling Defendant still believes that the Phase One Work has been fully performed, the Settling Defendant shall submit to the Trustees a written report by a registered professional engineer stating that the Phase One Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of the Settling Defendant or the Settling Defendant's Project Manager:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after review of the written report and consultation with the other Trustees, the Lead Administrative Trustee determines that any portion of the Phase One Work has not been completed in accordance with this Consent Decree, the Lead Administrative Trustee will notify the Settling Defendant in writing of the activities that must be undertaken by the Settling Defendant pursuant to this Consent Decree to complete the Phase One Work, provided, however, that the Trustees may only require the Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with both the Work Plan and the Forest Road Agreement. The Lead Administrative Trustee, with concurrence of the other Trustees, will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree. The Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution).

c. If the Lead Administrative Trustee, following consultation with the other Trustees, concludes based on the initial or any subsequent report by Settling Defendant that the Work has been performed in accordance with this Consent Decree, the Lead Administrative Trustee, will so notify the Settling Defendant in writing.

## **VII. PAYMENTS BY THE SETTLING DEFENDANT**

15. Payment of Reimbursable Costs by Settling Defendant. Within 30 days of the Effective Date, the Settling Defendant shall pay a total of \$16,300.00 to the United States, the State, and the Tribe for outstanding unreimbursed assessment costs and costs to be incurred for oversight and monitoring of Settling Defendant's performance of the Work ("Reimbursable Costs"), as specified in subparagraphs 15.a., 15.b., and 15.c.

a. Payments to the United States. The Settling Defendant shall pay \$12,200.00 to the United States by certified or cashier's check in the amount due, payable to the "U.S. Department of Justice," referencing the civil action number of this case and DOJ No. 90-5-1-1-08549, and delivered to the Financial Litigation Unit of the United States Attorney for the District of Minnesota (612-664-5600). At the time of payment, Defendant shall send a copy of the check together with a transmittal letter, which shall state that the payment is for the reimbursable costs owed pursuant to the Consent Decree in *United States et al. v. Enbridge Energy Limited Partnership*, and shall reference Natural Resource Damage Assessment and Restoration Fund Account Number 14X5198 (NRDAR), the "Enbridge Energy Oil Spill, Cohasset, Minnesota;" U.S.A.O. file number ; the civil action number, and DOJ case number 90-5-1-1-08549. A copy of the check and the transmittal letter shall be sent to:

U.S. Department of Justice:

USPS address:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
Re: DJ # 90-5-1-1-08549  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044

Courier Address:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
DJ # 90-5-1-1-08549  
U.S. Department of Justice  
ENRD Mailroom, Rm. 2121  
601 D Street, NW  
Washington, DC 20004

U.S. Department of the Interior:

Field Supervisor  
United States Fish & Wildlife Service  
Twin Cities Ecological Services Field Office  
4101 American Blvd., East  
Bloomington, MN 55425-1665

Kimberly Gilmore  
U.S. Department of the Interior  
Office of the Solicitor  
Three Parkway Center, Room 385  
Pittsburgh, PA 15220

U.S. Department of the Interior  
Natural Resource Damage Assessment and Restoration Program  
Attn: Restoration Fund Manager  
1849 C Street, NW Mailstop 4449  
Washington, DC 20240

b. Payments to State of Minnesota. The Settling Defendant shall pay \$1,400.00 to the Minnesota Department of Natural Resources. Payment to the Minnesota

Department of Natural Resources shall be made by certified or cashiers check made payable to Treasurer, State of Minnesota, and shall reference the Enbridge Energy Oil Spill. At the time of payment, the Settling Defendant shall simultaneously send written notice of payment and a copy of any transmittal documentation to:

Minnesota Department of Natural Resources  
Attn.: David Wright  
500 Lafayette Road  
St. Paul, MN 55155

- c. Payments to Tribe. Settling Defendant shall pay \$2,700.00 to the Tribe.

Payment to the Tribe shall be made by certified or cashiers check made payable to Leech Lake Dept. Of Resource Management, and shall reference the Enbridge Energy Oil Spill. At the time of payment, the Settling Defendant shall simultaneously send written notice of payment and a copy of any transmittal documentation to:

Leech Lake Band of Ojibwe  
Attn.: Shirley Nordrum  
115 Sixth St. NW, Suite E  
Cass Lake, MN 56633

and

Leech Lake Bank of Ojibwe  
Attn: Legal Department  
115 Sixth St. NW, Suite E  
Cass Lake, MN 56633

16. Non-Compliance with Payment Obligations.

a. Interest on Late Payments. In the event that any payment required by Paragraph 15 is not made when due, the Settling Defendant shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment.

- b. Stipulated Penalties. In addition to the Interest required to be paid under

the preceding Subparagraph, if any payment required by Paragraph 15 is not made when due, the Settling Defendant shall also pay as stipulated penalties \$500.00 per late payment per day through the date of full payment.

17. Payment of Interest and Stipulated Penalties. Any Interest payment under Subparagraph 16.a. shall be paid in the same manner as the overdue principal amount, and shall be directed to the same fund or account as the overdue principal amount. Any stipulated penalties payments under Subparagraph 16.b. shall be paid to the entity to whom the late payment forming the basis for the stipulated penalty was owed, in accordance with payment instructions set forth in Paragraph 15 above.

### **VIII. INDEMNIFICATION**

18. Settling Defendant's Indemnification of the Trustees.

a. The United States, the State, and the Tribe do not assume any liability by entering into this Consent Decree or by virtue of any activities to be performed by the Settling Defendant under this Consent Decree. The Settling Defendant shall indemnify, save, and hold harmless the United States, the State, and the Tribe and their officials, agents, employees, contractors, subcontractors or representatives for or from any and all claims or causes of actions arising from, or on account of, negligent or other wrongful acts or omissions of the Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Further, the Settling Defendant agrees to pay the United States, the State, and the Tribe all costs incurred including, but not limited to, attorney's fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States, the State or the Tribe based on negligent or other wrongful acts or omissions of the Settling

Defendant, its officers, directors, employees, agents, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States, the State, and the Tribe shall not be a party to any contract entered into by or on behalf of the Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any contractor hired by them shall be considered an agent of the United States, the State or the Tribe.

b. The United States, the State or the Tribe shall give the Settling Defendant notice of any claim for which the United States, the State or the Tribe plans to seek indemnification pursuant to this Section and shall consult with the Settling Defendant prior to settling such claim.

19. The Settling Defendant waives all claims against the United States, the State, and the Tribe for damages or reimbursement or for set-off of any payments made or to be made to the United States, the State or the Tribe, arising from or on account of any contract, agreement or arrangement between the Settling Defendant and any person for performance of Work, including, but not limited to, claims on account of construction delays. In addition, the Settling Defendant shall indemnify and hold harmless the United States, the State, and the Tribe with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement or arrangement between the Settling Defendant and any person for performance of Work, including but not limited to, claims on account of construction delays.

#### **IX. FORCE MAJEURE**

20. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a *Force Majeure* event, the Settling Defendant shall notify the Lead Administrative Trustee, orally, within 48 hours of when

the Settling Defendant first knew or should have known that the event might cause a delay. Within seven days thereafter, the Settling Defendant shall provide to the Lead Administrative Trustee, a written explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the rationale for attributing such delay to a *Force Majeure* event; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a *Force Majeure* event. Failure to comply with the above requirements shall preclude the Settling Defendant from asserting any claim of *Force Majeure* for that event for the period of time of such failure to comply, and for any additional delay caused by such delay. The Settling Defendant shall be deemed to have notice of any circumstances of which its contractors or subcontractors had or should have had notice.

21. If the Lead Administrative Trustee, following consultation with the other Trustees, agrees that the delay or anticipated delay is attributable to a *Force Majeure* event, the time for performance of the obligations under this Consent Decree that are affected by the *Force Majeure* event will be extended by the Lead Administrative Trustee for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *Force Majeure* event shall not, of itself, extend the time for performance of any other obligation. If the Lead Administrative Trustee, following consultation with the other Trustees, does not agree that the delay or anticipated delay has been or will be caused by a *Force Majeure* event, the Settling Defendant will be notified of that decision in writing by the Lead

Administrative Trustee. If the Lead Administrative Trustee, following consultation with the other Trustees, agrees that the delay is attributable to a *Force Majeure* event, the Lead Administrative Trustee will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the *Force Majeure* event.

22. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 days after receipt of the Lead Administrative Trustee's notice. In any such proceeding, the Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a *Force Majeure* event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that the Settling Defendant complied with the requirements of Paragraphs 20 and 21, above. If the Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by the Settling Defendant of the affected obligation of this Consent Decree as identified by the Lead Administrative Trustee and the Court.

#### **X. DISPUTE RESOLUTION**

23. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedure of this Section shall be the exclusive mechanism to resolve disputes arising under this Consent Decree and its Appendices. The procedures set forth in this Section shall not apply to actions by the Trustees to enforce the Settling Defendant's obligations that have not been disputed in accordance with this Section.

24. Informal Dispute Resolution. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the

Parties to the dispute. Informal negotiations cannot exceed 20 days from the time a dispute arises, unless modified by written agreement of the Parties to the dispute. A dispute is considered to have arisen when one Party sends the other Parties a written Notice of Dispute.

25. Formal Dispute Resolution:

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Lead Administrative Trustee, following consultation with the other Trustees, shall be considered binding unless, within ten days after the conclusion of the informal negotiations period, the Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the Trustees a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon.

b. Within 30 days after receipt of Settling Defendant's Statement of Position, the Lead Administrative Trustee will serve on the Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Lead Administrative Trustee. Within ten days after receipt of the Lead Administrative Trustee's Statement of Position, the Settling Defendant may submit a Reply.

c. Following receipt of Settling Defendant's Statement of Position submitted pursuant to subparagraph (a) and after service of the Lead Administrative Trustee's Statement of Position and any Reply, the Regional Director for U.S. Fish and Wildlife Service will issue a final decision resolving the dispute. The Regional Director's decision shall be binding on the Settling Defendant unless, within 20 days of receipt of the decision, the Settling Defendant files

with the Court and serves on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Lead Administrative Trustee, following consultation with the other Trustees, may file a response to the Settling Defendant's motion.

d. Judicial review of any decision of the Regional Director governed by this Paragraph shall be limited to the assembled administrative record of the dispute, which shall include the statements of position of the Parties and the accompanying supporting documentation.

26. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligations of the Settling Defendant under this Consent Decree not directly in dispute, unless the Trustees or the Court determines otherwise.

**XI. STIPULATED PENALTIES**

27. The Settling Defendant shall pay stipulated penalties to the United States, the State and the Tribe for each failure to comply with the firm dates listed on Appendix E (being the activities which are to take place within 30 days of the Effective Date; the date for the start of work; the date for completion of a final report; and the dates relating to the diesel engine retrofit) unless excused under Section IX (*Force Majeure*). Any stipulated penalties paid pursuant to this Section shall be in addition to the payments required pursuant to Section VII (Payments by the Settling Defendant), Paragraph 15. The Settling Defendant shall pay the following total amounts per day for each day of violation:

Period of Failure to Comply	Penalties Per Violation Per Day
1 <sup>st</sup> through 14 <sup>th</sup> day	\$2,000.00

15 <sup>th</sup> through 44 <sup>th</sup> day	\$3,000.00
45 <sup>th</sup> day and beyond	\$5,000.00

28. All stipulated penalties shall be due and payable within 30 days of the Settling Defendant's receipt from any of the Trustees of a demand for payment of the stipulated penalties. Any stipulated penalties payments under this Section shall be paid in the following proportions: 34% to the United States, 33% to the State, and 33% to the Tribe. Stipulated Penalties shall be paid in the manner identified in Paragraph 15.

29. All stipulated penalties shall begin to accrue on the day that complete performance is due or a violation of the Consent Decree occurs, and shall continue to accrue through the final day of the correction of the non-compliance. Nothing herein shall preclude the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree. If the Lead Administrative Trustee, following consultation with the other Trustees, determines that the Settling Defendant has failed to comply with a requirement of this Consent Decree, the Lead Administrative Trustee will notify the Settling Defendant and describe the noncompliance. However, stipulated penalties shall accrue as provided in this Paragraph regardless of whether the Settling Defendant has been notified of the violation.

**XII. COVENANTS AND RESERVATION OF RIGHTS BY PLAINTIFFS**

30. Covenants by the United States and the Tribe. Except as specifically provided by Paragraph 32 (General Reservation of Rights) and Paragraph 32.b. (Special Reservation of Rights for Unknown Conditions and New Information), the United States and the Tribe covenant not to sue or take administrative action against the Settling Defendant pursuant to OPA Section 1017(b), 33 U.S.C. § 2717(b), for Natural Resource Damages that have resulted from the Discharge Incident. These covenants not to sue are conditioned upon the complete and

satisfactory performance by the Settling Defendant of its obligations under Sections VI and VII of this Consent Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

31. Covenants by the State. Except as specifically provided by Paragraph 32 (General Reservation of Rights) and Paragraph 32.b. (Special Reservation of Rights for Unknown Conditions and New Information), the State covenants not to sue the Settling Defendant pursuant to OPA Section 1017(b), 33 U.S.C. § 2717(b), or Minn. Stat. § 115.071, subd. 3 for Natural Resource Damages that have resulted from the Discharge Incident. These covenants not to sue are conditioned upon the complete and satisfactory performance by the Settling Defendant of its obligations under Sections VI and VII of this Consent Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

32. General Reservation of Rights.

a. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraphs 30 and 31. The United States, the State, and the Tribe reserve, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all other matters, including but not limited to, the following:

- i. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- ii. liability for any removal costs under OPA Section 1002(b)(1), 33 U.S.C. § 2702(b)(1);
- iii. claims based on rights subrogated to the Oil Spill Liability Trust Fund under OPA Section 1015, 33 U.S.C. § 2715, for any amounts paid or to be paid by the Oil Spill Liability Trust Fund to any person for removal costs or damages in connection with any

past, present, or future discharge, or substantial threat of discharge, of Oil at or from the Site;

iv. liability for any other costs relating to the Discharge Incident incurred or to be incurred by the United States, the State or the Tribe that are not within the definition of Natural Resource Damages;

v. liability for any corrective action, response activity, response costs, or any other cleanup or regulatory action at the site pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, the Clean Water Act, 33 U.S.C. §§ 1251-1387, or any other applicable federal law or Minnesota state law as a result of the release or threatened release of any hazardous substance or discharge of Oil at or from the Site;

vi. liability arising from the past, present or future disposal, release, or threat of release of hazardous substances or discharges of Oil anywhere other than at or from the Site;

vii. liability for damages for injury to, destruction of, or loss of Natural Resources resulting from releases or threatened releases of hazardous substances or discharges of Oil other than during the Discharge Incident;

viii. liability arising from any future disposal, release or threat of release of hazardous substances or discharges of Oil at or from the Site after the date of lodging of this Consent Decree; and

ix. criminal liability.

33. Special Reservation of Rights for Unknown Conditions and New Information.

Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe, reserve the right to institute proceedings against the Settling Defendant in this action or in

a new action seeking recovery of Natural Resource Damages, including costs of damages assessment, based on: (i) conditions caused by the Discharge Incident, unknown to the Trustees as of the date of lodging of this Consent Decree, that result in the discharge of Oil that contributes to injury to, destruction of, or loss of Natural Resources; or (ii) information received by the Trustees after the date of lodging of the Consent Decree which indicates that the Discharge Incident has resulted in injury to, destruction of, or loss of Natural Resources of a type or future persistence that was unknown to the Trustees as of the date of lodging of this Consent Decree.

34. Rights of Non-Parties. Nothing in this Consent Decree is intended as a covenant not to sue or a release from liability for any persons or entities not parties to this Consent Decree. The United States, the State, and the Tribe expressly reserve all claims, demands, and causes of action, either judicial or administrative, past or future, in law or equity, against all such persons and entities.

### **XIII. COVENANT BY THE SETTLING DEFENDANT**

35. The Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, the Oil Spill Liability Trust Fund, the State, or the Tribe, or their agents, employees or contractors, with respect to Natural Resource Damages or this Consent Decree, including, but not limited to assertion or presentment of any claim under OPA Section 1009, 33 U.S.C. § 2709, for Natural Resource Damages arising from the Discharge Incident or the discharge of Oil at and/or from the Site.

### **XIV. EFFECT OF SETTLEMENT**

36. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence

shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law.

37. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Discharge Incident and/or Site against any person not a Party hereto.

38. Waiver of Claim Splitting Defenses. In any subsequent administrative or judicial proceeding initiated by the United States, the State and/or the Tribe for injunctive relief, recovery of response costs, or other appropriate relief relating to the Discharge Incident and/or the Site, which is premised on any reservation of rights set forth in Paragraph 32 (General Reservations of Rights) or Paragraph 32.b. (Special Reservation of Rights for Unknown Conditions and New Information), the Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States, the State or the Tribe in the subsequent proceeding were or should have been brought in the instant case; *provided, however*, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraph 30 (Covenants by the United States and the Tribe) and Paragraph 31 (Covenants by the State).

#### **XV. NOTICES AND SUBMISSIONS**

39. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or any other document is required to be sent by one Party to another, it shall be directed to individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions

shall be considered effective upon receipt, unless otherwise provided.

As to the United States:

U.S. Department of Justice:

USPS address:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
Re: DJ # 90-5-1-1-08549  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044

Courier Address:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
DJ # 90-5-1-1-08549  
U.S. Department of Justice  
ENRD Mailroom, Rm. 2121  
601 D. Street, NW  
Washington, DC 20004

U.S. Department of the Interior:

Robyn Thorson  
Regional Director  
U.S. Fish and Wildlife Service  
Bishop Henry Whipple Federal Building  
1 Federal Drive  
Fort Snelling, MN 55111

and

Kimberly Gilmore  
U.S. Department of the Interior  
Office of the Solicitor  
Three Parkway Center, Room 385  
Pittsburgh, PA 15220

As to the State:

For MDNR:

Minnesota Department of Natural Resources  
Attn.: Marilyn Danks  
500 Lafayette Road  
St. Paul, MN 55155

For MPCA:

Minnesota Pollution Control Agency  
Attn.: Kevin Faus  
520 Lafayette Road  
St. Paul, MN 55155

For the Minnesota Attorney General's Office:

Ann E. Cohen, Assistant Attorney General  
NCL Tower, Ste 900  
445 Minnesota Street  
St. Paul, MN 55101-2127

As to the Tribe:

Tribal Attorney  
Legal Department  
Leech Lake Band of Ojibwe  
115 Sixth St. NW, Suite E  
Cass Lake, MN 56633

and

Shirley Nordrum, Environmental Director  
Leech Lake Band of Ojibwe  
115 Sixth St. NW, Suite E  
Cass Lake, MN 56633

As to Settling Defendant:

Robert Steede  
Supervisor, Environment  
Enbridge (U.S.) Inc.  
119 N. 25<sup>th</sup> Street, East  
Superior, WI 54880

and

Joseph Naylor  
Senior Counsel  
Enbridge (U.S.) Inc.  
1100 Louisiana Street, Suite 3200  
Houston, TX 77002-5217

**XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

40. This Consent Decree shall be lodged with the Court for a period of at least 30 days for public notice and comment. The United States reserves, and all other Parties acknowledge, the United States' right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations, which indicate that this Consent Decree is inappropriate, improper, or inadequate.

41. The Parties agree that the Settling Defendant shall not be required to file an answer to the Complaint unless or until 30 days after: (i) the United States has informed the Parties in writing that it has withdrawn its consent to this Consent Decree; or (ii) the Court has denied the United States' motion to enter the Consent Decree.

42. If for any reason the Court should decline to approved this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XVII. EFFECTIVE DATE AND RETENTION OF JURISDICTION**

43. This effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

44. This Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes in accordance with Section X (Dispute Resolution) hereof.

### **XVIII. CONSENT DECREE MODIFICATIONS**

45. Any material modifications to the Consent Decree may be made only by agreement of the Parties, in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Consent Decree shall be made by agreement of the Parties, in writing, and shall not take effect until filed with the Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

46. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Decree in its entirety without modification, addition, or deletion except as agreed to by the Parties.

47. Economic hardship or changed financial circumstances of the Settling Defendant shall not serve as a basis for modifications of this Consent Decree.

### **XIX. APPENDICES**

48. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the Restoration Plan and Environmental Assessment, dated November 2005.

“Appendix B” is the Natural Resource Restoration Project Implementation and Monitoring Work Plan.

“Appendix C” is the Restoration Project Implementation and Monitoring Agreement between Natural Resource Trustees, Enbridge, and the USDA Forest Service for Forest Road 3725 Restoration Project.

“Appendix D” is the Map of the Enbridge Energy Pipeline Site.

“Appendix E” is the Restoration Projects - - Time Schedule.

## **XX. SIGNATORIES / SERVICE**

49. The undersigned representatives of the Parties each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document

50. The Settling Defendant consents to the entry of this Consent Decree without further notice. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

51. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of the Settling Defendant with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

## **XXI. FINAL JUDGMENT**

52. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

53. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State, the Tribe, and

the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2008

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United States District Court Judge  
District of Minnesota

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enbridge Energy Limited Partnership (D. Minn.) relating to Natural Resource Damages at the Enbridge Energy Pipeline Site.

FOR THE UNITED STATES OF AMERICA

RONALD J. TENPAS  
Assistant Attorney General  
Environment and Natural Resources Division

Date: 10/27/08

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BENJAMIN FISHEROW  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

Date: 10/30/08

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GREGORY I. SUKYS  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
202-514-2068/616-6584 (FAX)

£

OF COUNSEL:

KIMBERLY S. GILMORE  
U.S. Department of the Interior  
Office of the Solicitor  
Three Parkway Center, Rm. 385  
Pittsburgh, Pennsylvania 15220  
412-937-4017

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enbridge Energy Limited Partnership (D. Minn.) relating to Natural Resource Damages at the Enbridge Energy Pipeline Site.

FRANK J. MAGILL, JR.  
United States Attorney

*October 29, 2008*

FRIEDRICH A. P. SIEKERT  
Assistant United States Attorney  
Attorney ID No. 142013  
600 U. S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
612-664-5697

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enbridge Energy Limited Partnership (D. Minn.) relating to Natural Resource Damages at the Enbridge Energy Pipeline Site.

FOR THE STATE OF MINNESOTA

Date: 7/30/08

BRAD MOORE  
Commissioner & Natural Resource Co-Trustee  
Minnesota Pollution Control Agency

Date: 8/12/08

MARK HOLSTEN  
Commissioner & Natural Resource Co-Trustee  
Minnesota Department of Natural Resources

Approved as to form and legality:

LORI SWANSON  
Attorney General of Minnesota

Date: 8/18/08

ANN E. COHEN  
Assistant Attorney General  
State of Minnesota  
Atty. No. 16677

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enbridge Energy, Limited Partnership (D.Minn.) relating to National Resource DamagesI. at the Enbridge Energy Pipeline Site.

FOR LEECH LAKE BAND OF OJIBWE

Date: 7-21-08

\_\_\_\_\_  
ARTHUR D. LAROSE, Tribal Chairman

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enbridge Energy, Limited Partnership (D. Minn.) relating to Natural Resource Damages at the Enbridge Energy Pipeline Site.

FOR ENBRIDGE ENERGY, L.P.

/   
 Robert Steede  
 Supervisor, Environment  
 Enbridge (U.S.) Inc.  
 119 N. 25<sup>th</sup> Street, East  
 Superior, WI 54880

If different from above, the following is the name and address of the Settling Defendant's agent for service and the name and address of the Settling Defendant's counsel. Counsel may act as agent for service.

Agent for Service

Attorney

\_\_\_\_\_  
 Robert Steede  
 Supervisor, Environment  
 Enbridge (U.S.) Inc.  
 119 N. 25<sup>th</sup> Street, East  
 Superior, WI 54880

\_\_\_\_\_  
 Joseph Naylor  
 Senior Counsel  
 Enbridge (U.S.) Inc.  
 1100 Louisiana Street, Suite 3200  
 Houston, TX 77002-5217